Supreme Court of the United States

OCTOBER TERM, 1907.

No. 295.

SALLIE J. McDANIEL, ET AL., APPELLANTS,

VS.

GEO. M. TRAYLOR, ET AL., APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DIVISION OF THE EASTERN DISTRICT OF ARKANSAS.

BRIEF FOR APPELLEES.

ARGUMENT.

There are three assignments of error.

The first is as follows:

"It was error in the Circuit Court in the light of the opinion of the Supreme Court in this case (196 U. S., 415) to deny its Jurisdiction (and ?) to dismiss the bill for want of Jurisdiction." (77.)

This is a general assignment, and raises no question.

The second assignment of error is as follows:

"It was error in the Circuit Court to find and hold that it was essential to maintain the jurisdiction, that any two or more of the defendants conspired to procure the allowance of their claims; because an actual conspiracy was not necessary where the action and conduct of the defendants acting by and through their attorneys with the attorney of the administrator, were such as to procure the fraudulent allowances of the claims." (77.)

The bill was held good by this Court on demurrer, because of the broad allegation of the joint action of the defendants, making the several judgments, according to the allegation, in effect but one act. This sweeping allegation of conspiracy was held to distinguish the case from all that had gone before, and to make a case of jurisdiction where otherwise there would have been none.

An allegation that saves a bill on demurrer, cannot be treated as unimportant when it comes to the proof.

This assignment of error is simply an insistence that it was error in the lower Court to follow the law of the case as laid down by this Court, where the following language was used on the vital point:

"If the plaintiffs do not prove such a combina-

tion and conspiracy in respect at least of so many of the specific claims as in the aggregate will be of the required amount, then their suit must fail for want of jurisdiction in the Circuit Court."

The third assignment of error is as follows:

"Because the true test of the jurisdiction in a preceeding of this nature is the value of the property involved and not the amount of the claim which is attacked, and the Circuit Court erred in not so finding and holding." (77.)

The opinion of this Court in this case is expressly to the contrary and in this language:

"Hence, as we have said, the value of the matter in dispute is the aggregate amount of the claims fraudulently procured by the defendants acting in combination, to be allowed in the Probate Court as claims against the state of Hiram Evans."

Had the value of the property furnished the criterion, the amount of the claims and allegations of combination and conspiracy would have been surplusage.

No assignment of error questions the correctness of the Courts finding of fact, and still, the case was disposed of on the facts.

As a case in this Court presents what is included in the assignments of error and no more,

appellees could safely rest upon what has been said.

But the sweeping and extravagant charges of fraud, and unprofessional conduct will justify the expenditure of a little time in showing that altogether different inferences can be drawn from the testimony, although it is the testimony of appellants only; and meager. As they made no effort to prove the essential allegations of combination and conspiracy, the point was never reached where proof of any character was necessary from appellees.

A portion of the answer of defendants is as follows:

"They admit that among the assets of the estate of Hiram Evans, a certain drug store came to the hand of the administrator, with fixtures, etc., thereto belonging, but they deny that said drug store was sold by said administrator to John Evans, and in this connection the defendants state the facts to be: That the said John Evans had for many years in the life-time of Hiram Evans, conducted said drug store business, and had charge thereof, and after the death of Hiram Evans sought to acquire it for himself, and with this end in view he was, by the administrator and with the consent of the heirs, including complainants herein, allow-

ed to continue in possession of said drug store with the understanding that it should become his property if he paid and satisfied the debts it owed at time of the death of Hiram Evans, and on no other condition.

That with the knowledge of said administrator, and the heirs of Hiram Evans, including plaintiffs, the said John Evans conducted said business in his own name, and thereby made the said drug store a basis of credit, and contracted thereon the debts of which the complainants complain.

These defendants admit that on and about the time alleged by complainants, the said John Evans delivered said drug store back to possession of James Evans, as administrator of the estate of Hiram Evans, and all that belonged therewith, and this was done because of the inability of the said John Evans to pay the debts of the drug store and acquire the property therein.

These defendants admit that John Evans was then wholly insolvent.

These defendants deny, that thereupon, or at any other time, they colluded and confederated with the said John Evans and James Evans, as administrator, to secure the payment of their demands against John Evans, out of the assets of Hiram

Evans, deceased, and they deny that so conspiring and confederating, they procured the said James Evans to illegally and fraudulently allow said claims against the estate of Hiram Evans; and they deny that said claims were fraudulently or collusively presented to the Probate Court of St. Francis County, Arkansas.

And in this connection the defendants state the facts to be, that when said administrator received the said drug store back from the said John Evans, upon the grounds that the title never passed to him, their claims for goods sold the said John Evans and with which the stock of said drug store was kept replenished, at once became equitable demands, against said estate, which the heirs, including complainants, were, and are estopped to deny, by reason of the fact that the possession and handling of said drug store by the said John Evans was with their knowledge and consent.

These defendants deny that in presenting said claims to the Probate Court, there was any concealment of the fact that the goods had been sold to John Evans, but on the contrary the sales to John Evans and the circumstances thereof, and the retaking of the drug store by the administrator, were relied upon as creating just liabilities against the

estate, and were so presented to the said Probate Court, and received the approval of the said Court, and the claims were allowed, not through any character of collusion or concealment, but upon the open contention that as the drug store had all the time been the property of the estate, (as then developed) the estate should pay for its replenishing." (43-44.)

This excerpt from the answer is made because from the little proof put in by the appellants, its substantial truth is proven.

An old deposition of James Evans, taken in 1896, in the litigation in the State Court, was read. (61.) By this it is shown that a couple of days after the death of Hiram Evans, *all* the heirs met, and agreed that J. J. (John) Evans might have the drug store, *if he would pay all the indebtedness against it.*

That on this understanding with all the heirs, the administrator turned drug store over to J. J. Evans, who ran it some fourteen months, and turned it back to the administrator, because he had been unable to perform his part of the conditional sale and purchase. (62.)

Mr. R. J. Williams, representing the administrator, told him that J. J., would have to appear in

there (the store) as the agent of the estate, and that he should allow the claims.

The administrator took the drug store back on the ground that the estate had never parted with the title, and proceeded to run it himself for the estate. (64.)

Some $16,000 or $17,000 in cash was divided between the heirs a few days after the intestate's death. (67.)

The deceased owed something over $4,000 at the time of his death. (51.)

Slight as the above testimony is, it is ample to disclose the theory upon which the claims for goods sold the drug store while J. J. Evans was in charge, were allowed by the Probate Court.

The administrator had resumed control of the store, upon the ground that it had all the time been the property of the estate. In retaking the store he took it as it stood, kept up by purchases made by J. J. Evans, the ostensible owner, from these defendants. The apparent ownership had been a basis of credit for J. J. Evans, and when it was retaken by the administrator—a trustee for heirs as well as creditors—these defendants (appellees) insisted that the estate should pay for the goods with which it had been kept up.

The other course open for the administrator was to waive the conditional character of the sale to J. J. Evans, and let his creditors make their money out of the store. Mr. R. J. Williams, attorney for the administrator, advised him to take the store back, and subsequently advised him to allow the claims for goods with which it had been from time to time replenished. The equity of defendants to be paid by the estate, under the circumstances, was obvious; and it is not difficult to understand why an attorney should advise the allowance of the claims. A contrary course would have involved the administrator in litigation about the store. The claims (in suit here) were all alike—each resting on an equity common to all, and when that equity was recognized, with reference to one claim, the likeness of the others—and not collusion—caused the allowance of all.

And this equity in defendants to be paid by the estate, was absolutely binding upon *the heirs of H. Evans, because the possession and ostensible ownership of the store by J. J. Evans was with their express consent and approval.* (61.)

When heirs consent to irregularities in the management of an estate, they cannot afterwards complain, or avoid the consequences.

Poole vs Monday, 103 Mass., 174.

Perry vs Wooten, 5 Humph., 524.

Watkins vs Stewart, 78 Va., 111.

That creditors of the estate, at the time of the death of the intestate, would not have been bound by the course taken with the drug store, is quite true. But the parties here are heirs. They were also parties to the additional irregularity of dividing the $16,000 or $17,000 in cash, which should have gone into the hands of the administrator for the payment of debts. Result: a portion of the debts owed by the intestate, at his death, as well as the demands here in question, became charges against the real estate.

That the cause should be affirmed, is respectfully submitted.

R. W. NICHOLLS,

N. W. NORTON,

Counsel for Appellees.